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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

DORETHEA N. HORNBUCKLE,
Petitioner,

v.

ARCO OIL AND GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the inability of a civil rights plaintiff to pay her employer's attorney's fees is proper grounds for dismissing her Title VII case.

PARTIES

Dorethea N. Hornbuckle

Arco Oil and Gas Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dorethea N. Hornbuckle petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals For the Fifth Circuit in this case.

OPINIONS BELOW

The opinion, judgment and findings of fact and conclusions of law by the Fifth Circuit Court of Appeals concerning this case initially were reported at 732 F.2d 1233 (5th Cir. 1984). See Appendix A at 1a. The judgment and findings of fact and conclusions of law by the District Court as affirmed by the Fifth Circuit Court of Appeals in the second appeal was reported at — F.2d — (5th Cir. 1985). See Appendix B at 11a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals For

the Fifth Circuit was entered on May 24, 1984, reversing and remanding the original action of the District Court and the judgment of the United States Court of Appeals For the Fifth Circuit on the second appeal was entered on September 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS

The due process clause of Amendment V of the United States Constitution is set out in the Appendix E at 29a.

STATEMENT

Dorethea N. Hornbuckle is a Black-American female who was employed by the Defendant and continues to be so employed. The facts of the alleged acts of discrimination are not material in this Petition since this Petition centers upon the Order of Dismissal due to the Petitioner's inability to pay the sum of $5,701.43 by Noon, May 27, 1983.

This is a Title VII individual action under 42 U.S.C. Sec. 2000e *et seq*. A detailed statement of the case is necessary for a complete understanding of how the case arrived at being dismissed by the District Court.

Petitioner filed her Original Petition on September 11, 1981. Respondent filed a timely Original Answer and on December 15, 1981, Petitioner's counsel submitted a status report in accordance with the instructions of the District Court. Up to this point in time of the litigation nothing unusual had occurred.

On November 6, 1981, the Respondent commenced a series of deposition taking of the Petitioner. The deposition started on November 6, 1981, and that particular deposition, entitled Volume I, covered 172 pages and Respondent's Exhibits 1 through 11. Volume II of Petitioner's deposition covered 181 pages and was taken on successive days, March 18, 1982, and March 19, 1982. Volume III of Petitioner's deposition covered

120 pages and was taken on successive days, April 1, 1982, and April 2, 1982. Volume IV of Petitioner's deposition covered 55 pages and was taken on April 8, 1982. Finally, Volume V of Petitioner's deposition was taken on successive days, April 22, 1982, and April 23, 1982, and covered 220 pages, with 4 exhibits of the Respondent. In total, the Petitioner testified for some period of eight days and her testimony covered a total of 748 pages and 15 exhibits.

On June 11, 1982, Petitioner filed a Motion for Continuance stating to the District Court that over 4,000 documents had been provided to the Respondent by the Petitioner in the discovery process and that Petitioner had not had an opportunity to analyze the detailed nature of the information contained within all of the documents. This Motion for Continuance was granted.

During the period of time from June 11, 1982, until October 8, 1982, when it became clear to the Petitioner that the Respondent was not going to return the documents produced by the Petitioner during the discovery process, the Petitioner did not have access to the documents she had provided the Respondent. Accordingly, on October 8, 1982, Petitioner filed a Motion to Compel the Return of Documents stating to the District Court that the Respondent had communicated on September 24, 1982, that the Respondent would not return the documents to the Petitioner unless so ordered by the District Court. Petitioner pointed out in the Motion that the cause of action was set for trial on November 29, 1982, and that it would be impossible for the Petitioner to adequately prepare for trial if the Petitioner was not given the documents that she was relying on in order to present her case. While the Motion to Compel the Return of Documents was pending, the Respondent filed a Motion to Compel Discovery and a Motion for a Protective Order on October 26, 1982. The District Court referenced the discovery motions to Magistrate John B. Tolle for a determi-

nation. A hearing was held on October 27, 1982, and the Magistrate granted Petitioner's Motion to Compel the Return of Documents and ordered the Respondent to return to the Petitioner within ten days of the date of the Order the original documents or true and correct copies of "all such documents". Additionally, the Magistrate granted Respondent's Motion for a Protective Order.

On October 29, 1982, Petitioner filed a Motion for Continuance once again pointing out to the District Court that the Petitioner had not received the documents she had provided Respondent back from the Respondent.

On November 3, 1982, Respondent filed a Response to Petitioner's Motion for Continuance, an Application for a Stay of the Magistrate's Ruling Pending Appeal, and an Application for Review of the Magistrate's Order. Summarily, on November 4, 1982, the Magistrate granted the Respondent's Application for a Stay Pending Appeal of his Order.

On November 5, 1982, the District Court, in chambers, conducted a pre-trial hearing to consider the Respondent's Application for Review of the Magistrate's Order.

At the pre-trial hearing, Counsel for the Petitioner advised the Court that a continuance would not be necessary if Petitioner could get the documents back from the Respondent. During the pre-trial conference Petitioner's Counsel pointed out to the Court the importance and necessity of the documents to the Petitioner. In addition, Petitioner's Counsel argued to the Court the principle involved in the discovery process that when one party complies with a subpoena and delivers to the other party documents in compliance with the discovery process that if the giving party does not receive the documents back, then the process of discovery is frustrated. Petitioner's Counsel distinguished *Sanders v. Shell Oil Co.*, 678 F.2d 614 (5th Cir. 1982), by demonstrating to the District Court that

the Petitioner did not "steal" the documents and although the Respondent made allegations of misappropriation of the documents in their various motions that there were no allegations of theft and that the Petitioner was entitled to the documents in order to prepare for trial. The District Court recognized that there were discovery problems in the litigation when the District Court stated, "It seems to me you are headed into lots of discovery problems." The District Court, nevertheless, on November 8, 1982, entered an Order that granted the Petitioner's Motion for Continuance, vacated the November 29, 1982, trial setting and reversed the Magistrate's Order of October 27, 1982, as pertained to the portion compelling return of the documents in question and affirmed the Magistrate's Order of October 27, 1982, as to the portion granting Respondent's Motion for a Protective Order. In addition, the District Court ordered the Respondent to make the documents in question available to Petitioner's Counsel for review during reasonable hours between the date of November 8, 1982, and 5:00 P.M. on January 31, 1983. The District Court did not determine that the Magistrate was clearly erroneous or that the Magistrate's actions were contrary to law or that the Magistrate abused his discretion in entering the Discovery Order. Subsequent to this Order of the District Court, an Agreed Order Compelling Discovery and an Agreed Order Enlarging the Time for Respondent to Answer or Object to Petitioner's First Set of Interrogatories and First Request for Production of Documents was entered by the District Court. Meanwhile, Petitioner's Counsel had within the time period allowed by the District Court reviewed the documents in the possession of the Respondent and on February 9, 1983, the Petitioner communicated to the Court that after a review of the documents that the Petitioner would like to have some of the documents in order to be able to prepare for trial. Petitioner attached a list of the pages and a short synopsis of the explanation of the documents. Petitioner suggested that she be allowed to make

copies of the material and that whatever protective order deemed necessary by the Respondent be entered and Petitioner agreed to such a protective order. Appendix D at 26a.

On February 24, 1983, Petitioner received a communication from the Respondent responding to the communication to the Court wherein the Respondent elected to treat the request of the Petitioner as a request for production of documents pursuant to Federal Rules of Civil Procedure, Rule 34. Generally, the Respondent objected to the production of the documents listing the general objection of irrelevance and priviliged communication with specific objections to the documents enumerated by the Petitioner. Although the Petitioner had requested a prehearing conference the issues pertaining to the documents were never resolved prior to the dismissal of the action.

On March 18, 1983, Respondent filed a Motion for Sanctions alleging that the Petitioner had not complied with the Agreed Order Compelling Discovery. On March 28, 1983, following a Reference Order from the District Court to the Magistrate, the Magistrate considered the Respondent's Motion for Sanctions and entered an Order that the Petitioner answer Interrogatories No. 6, 7, 8 and 9, with such answers being limited to the names and addresses of such persons and answer Interrogatories No. 10 and 11, such answers to be served not later than April 4, 1983. Also, the Magistrate ordered that the Petitioner "is not required" to answer Interrogatories No. 1, 2, 3, 4, or 5. The Order concluded by stating "All relief not expressly granted herein is denied."

On April 1, 1983, Respondent filed an Application for Review of the Magistrate's Order of March 28, 1983, and on April 12, 1983, the District Court entered an Order vacating the Magistrate's Order of March 28, 1983, as to "the issue of reasonable expenses". In addition, the District Court ordered the Petitioner to pay the Respondent the sum of $250.00 as reasonable expenses, including attorney's fees. The District

Court then issued the following Order: "The Magistrate's Order is hereby AFFIRMED as to the exclusion of evidence issues." The Court concluded its Order by denying Petitioner's Motion for Continuance, Petitioner's Motion to Compel Discovery and Petitioner's Motion to Extend Time. It is important to note at this juncture that the Magistrate's Order of March 28, 1983, did not address the issue of "the exclusion of evidence issues" nor did the District Court determine that the Magistrate's Order was clearly erroneous, contrary to law or an abuse of discretion by the Magistrate.

On April 12, 1983, Petitioner filed Proposed Findings of Fact and Conclusions of Law and on April 26, 1983, a Pre-trial Order was entered that was signed by Petitioner's Counsel, Counsel for the Respondent, and by the District Court.

On April 27, 1983, Petitioner filed a second and more detailed set of Proposed Findings of Fact and Conclusions of Law. On April 29, 1983, the Trial Court entered an Order reflecting what had occurred when the case was called for trial on April 27, 1983, at 2:00 P.M. (The proceedings of that hearing are contained in the record, Volume 3, pages 1-26.) At the conclusion of the hearing on April 27, 1983, the Court entered oral orders which were reduced to writing in the April 29, 1983, Order. The District Court ordered that Petitioner's Counsel be fined the sum of $2,000.00 and that Petitioner pay to Respondent's Counsel the sum of $250.00 and that the Petitioner pay the reasonable expenses and attorney's fees incurred by the Respondent in preparing for the trial scheduled April 27, 1983. The Court also ordered that failure to timely comply with respect to the payments of the fine and the $250.00 reasonable expenses and attorney's fees would result in the dismissal of Petitioner's cause of action with prejudice.

On May 2, 1983, the Court on its own motion modified its Order of April 29, 1983, by reducing the fine for Petitioner's Counsel to the sum of $1,000.00 and extending the time of

payment until May 9, 1983, for the payment of the fine by Petitioner's Counsel from his personal funds and for the payment of the $250.00 by Petitioner to the Respondent as directed by the Order. The District Court further modified the Order of April 29, 1983, by providing that if the Petitioner failed to pay the $250.00 as directed that such failure would result "in a judgment for $250.00 being entered against the Plaintiff".

In accordance with the Court's directive, on May 2, 1983, the Respondent's Counsel filed its affidavit indicating that the total amount of expense for preparation of trial, including reasonable attorney's fees of $42,232.00, was the amount of $49,740.66. Petitioner filed a timely response on May 5, 1983, requesting that the Court follow the criteria of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and provide the Petitioner with the total time spent by each attorney, the increment breakdown for the dates, the time utilized in performing the services, the person performing the service, and the nature of the service. In addition, Petitioner filed a Request for Production of Documents as pertains to the time sheets or computer entries for the time for each attorney and each witness for the Respondent. In addition, Petitioner also requested that the Court allow the Petitioner sufficient opportunity to complete discovery prior to any hearing on the issue of attorney's fees and expenses so that the Petitioner could depose witnesses and secure copies of necessary documents in order to be able to adequately respond.

On May 9, 1983, Petitioner filed a Notice of Compliance by Plaintiff, Under Duress, With Court Order of April 12, 1983, Oral Order of April 27, 1983, Order of April 29, 1983, and Order of May 2, 1983, pointing out to the Court that the $250.00 was being paid "under duress".

On May 9, 1983, Petitioner filed a Motion and Brief to Vacate Order Entered by the Court on April 29, 1983, and

Amended on May 2, 1983. In Petitioner's Motion to Vacate the Petitioner reviewed the transactions of the immediate past relating to the potential dismissal of the Petitioner's case. Petitioner pointed out that the Order entered April 29, 1983, in Paragraph 1, indicated that Petitioner's Counsel was advised that the Court would not be able to reach the case the week of April 18 and would carry the case for trial the next week, and that no objection was made by Counsel to this new setting. Petitioner's Counsel agreed that no objection was made to the carrying of the case and pointed out to the Court that at the time the docket was called on April 18, 1983, counsel was advised to be on a standby basis and was to be kept informed by the District Court and counsels, respectively, were to keep themselves informed of the District Court's activities in the first case in trial. Petitioner's Counsel did keep himself informed and was advised in the latter part of the week of April 18, 1983, that the case was *tentatively* being set for Wednesday, April 27, 1983. Petitioner made no objection to this *tentative* setting since he was preparing to try the case. The call of the case to trial actually came when the District Court advised Petitioner's counsel at 10:00 A.M. that the case would start at 1:00 P.M. The time was revised for the taking of a jury award to 2:00 P.M., at which time the District Court called the case for announcement.

In its Motion to Vacate, Petitioner's Attorney advised the District Court that on Tuesday morning he was "in trial" in the United States District Court for the Northern District of Texas, having selected a jury and having had the jury placed "in the box" with instruction that he was to be on call and probably would continue the trial on Thursday, August 28, 1983. Petitioner's Counsel immediately advised the District Court on Tuesday, April 26, 1983, upon returning from Ft. Worth, Texas, of his being "in trial".

On May 19, 1983, the District Court denied Petitioner's

Request for Production of Documents filed May 5, 1983, made a finding that the Magistrate's failure to award reasonable attorney's fees in its March 28, 1983, Order, as reflected in the District Court's April 12, 1983, Order, was clearly erroneous and vacated the Court's May 2, 1983, Order assessing Petitioner's counsel the $1,000.00 fine. The District Court ordered that the Petitioner pay to the clerk of the Court for the benefit of the Respondent and its counsel the sum of $5,701.43, by Noon, May 27, 1983, and that if such sum was not timely paid in full the complaint would be dismissed with prejudice.

On May 27, 1983, the Court entered an Order of Dismissal With Prejudice at Petitioner's cost since the $5,701.43 had not been paid. However, Petitioner had filed prior to the entering of the Order a Motion and Brief to Vacate the Order entered by the District Court on May 19, 1983, which included an Affidavit from the Petitioner that she was unable to pay the sum ordered by the District Court.

On June 1, 1983, the District Court entered an Order denying Petitioner's Motion and Brief to Vacate the Court's May 19, 1983, Order.

On June 17, 1983, Petitioner filed a Motion for Relief from Order of Dismissal under Rule 60(b)(6) and on July 11, 1983, the District Court entered an Order denying the Rule 60(b)(6) request.

In the meantime, Petitioner filed, on June 24, 1983, her Notice of Appeal to the Fifth Circuit Court of Appeals

On June 18, 1984, the Fifth Circuit Reversed and Remanded the actions of the District Court, said Opinion being reported at 732 F.2d 1233 (5th Cir. 1984). Appendix A, at 1a.

On July 29, 1984, an In-Chambers Hearing before the District Court was held and a deposition schedule was established

so that the District Court could reach a determination as to the proper sanction, if any, to be levied against the Petitioner. Subsequent to the Hearing the Court entered a Discovery Order on July 30, 1984, which was extended so that depositions and written interrogatories and other affidavits and exhibits could be brought to the attention of the court.

On November 13, 1984, the District Court entered its Findings of Facts and Conclusions of Law dismissing the Petitioner's case with prejudice. On December 13, 1984, Notice of Appeal was perfected, which brought the case before the Fifth Circuit Court of Appeals a second time.

The Fifth Circuit Court of Appeals Affirmed the District Courts decision. Appendix B, 11a.

REASONS FOR GRANTING THE WRIT

The District Court abused its discretion and was clearly erroneous in dismissing Petitioner's cause of action because of her inability and failure to pay the sum of $5,701.43 by Noon, May 27, 1983.

Initially, the District Court ordered the Petitioner to pay $250.00 as expenses and attorney's fees to the Respondent. In so ordering, the District Court set aside the Magistrate's Order without a finding of the Magistrate's Order being clearly erroneous, contrary to law, or an abuse of discretion. The Petitioner paid the $250.00 under duress.

When the District Court required the Petitioner to pay the $5,701.43, the District Court was clearly putting civil rights on a monetary basis, that is, if you have the money to pay, you have the money to stay.

Although the District Court said initially it was trying to avoid dismissal it did not avoid dismissal because the District Court dismissed the case and denied the Petitioner's offer to

pay the money when the District Court denied Petitioner's Rule 60(b)(6) Motion.

The District Court was clearly erroneous in Finding of Fact No. 36 because on June 8, 1983, prior to the final ruling of the District Court, and a year before this dismissal in November, 1984, the Petitioner offered payment at the rate of $100.00 per month. This offer was not accepted by the Respondent because the Respondent was of the opinion that there was no award of attorneys' fees outstanding since the case had been dismissed.

The District Court was clearly wrong in forcing the Petitioner to pay the $250.00 that had not been ordered by the Magistrate, as well as to pay the monies ordered by the District Court in the amount of $5,701.43.

The District Court dismissed Petitioner's case because of noncompliance with an Order which the Petitioner was unable to meet economically. This drastic measure is not fair to the Petitioner because it puts the rule of law on a monetary system.

While this Court has held that a plaintiff cannot avoid a dismissal for lack of prosecution on the ground that the inaction was the fault of his attorney, generally federal district courts have been reluctant to impose on an innocent party as harsh a penalty as a dismissal with prejudice for the dilatoriness or dereliction of plaintiff's counsel. This is clearly the rule in the Fifth Circuit. *Flaska v. Little River Marine Construction Company*, 389 F.2d 885 (5th Cir. 1968), *cert. den.*, 392 U.S. 928, 20 L.Ed.2d 1387, 88 S.Ct. 2287; *Pond v. Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972).

It is clear that the Petitioner in her disobedience of the Order was not intentional or deliberate but was the result of her inability economically to meet the requirements of the Order. Such reason should be sufficient to avoid the drastic measure of dismissing this civil rights case. *Coon v. Charles W. Bliven*

& Co., 534 F.2d 44 (5th Cir. 1976) *Cert. den.*, 429 U.S. 980, 50 L.Ed.2d 588, 97 S.Ct. 491.

A dismissal such as this one is a severe sanction and should be used only in extreme circumstances where there is a clear record of delay or contumacious conduct or intentional disobedience of the court's order and where lesser sanctions would not be appropriate. *Mann v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75 (5th Cir. 1973); *Re Dolleslager*, 618 F.2d 322 (5th Cir. 1980); *Pond v. Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972); *Wrenn v. American Cast Iron Pipe Co.*, 575 F.2d 544 (5th Cir. 1978); *reh den.*, 578 F.2d 871 (5th Cir. 1978).

Lesser sanctions will normally suffice in all but the most flagrant of circumstances. *Re Dolleslager*, 618 F.2d 322 (5th Cir. 1980). The circumstances of this case are not so flagrant as to merit dismissal.

Petitioner's intent is an important, indeed crucial, factor that should be considered by the court in dismissal of causes of action since dismissals are limited to intentional, willful or flagrant noncompliance. *Counsel of Federated Organizations v. Mice*, 339 F.2d 898 (5th Cir. 1964); *Marshall v. Southern Farm Bureau Casualty Co.*, (D.C. La. 1964), 36 FRD 186, Aff'd, 353 F.2d 737 (5th Cir. 1964), *cert. den.*, 384 U.S. 910, 16 L.Ed.2d 363, 86 S.Ct. 1352. Clearly here the Petitioner's intent was not to violate the District Court's Order intentionally, willfully or to be in flagrant noncompliance. The Petitioner was following the advice of her lawyer who was advising her that in his opinion the District Court was in error and the case would be reversed, which was so ordered by the Fifth Circuit.

It is a better practice not to dismiss a civil rights case, and, under the circumstances of this case, it would be better practice to try the case on the merits and then, if the Petitioner is

successful, deduct from her award the monies ordered by the District Court to be paid to the Defendant. If the Petitioner is not successful, the District Court could at that time order compliance with the order on terms and conditions that would be just and equitable to the Petitioner and the Respondent.

The District Court was instructed by the Fifth Circuit in the reversal and remand opinion to consider additional sanctions against Petitioner's counsel if the Court determined that Petitioner could not pay the amount ordered by the Court. The Court did not consider this action prior to dismissal of Petitioner's case, although the District Court was well aware of this instruction.

At the July 29, 1984, In-Chambers Hearing, the District Court stated:

> I should tell you on the Plaintiff's side that if it develops that she is not able to pay the entire sum but able to pay a portion of the sum then I think that the Circuit is saying that the balance can well be assessed against counsel and that is certainly my leaning and I am just trying to follow what I discern from the Circuit's intent. They say including those that might be assessed against counsel. So if should turn out hypothetically, and we are not going to counsel's ability to pay. I am not trying to open that door. I am just saying if we should determine that she has the ability to pay twenty-five hundred or three thousand dollars, I would certainly entertain a move to assess the balance of these sanctions against counsel because I think that is what the Circuit did and I did that originally myself but backed off thinking it was too much to assess against her and Mr. Hernandez both. *I think what they are saying is go back and do that if you find she can't pay.* (Emphasis added.)

The District Court did not consider this option and chose

to dismiss the case contrary to the instructions of the Fifth Circuit. The District Court's failure to follow this instruction is clearly erroneous and an abuse of discretion.

The District Court denied the Petitioner an opportunity to determine whether or not amounts claimed by the Respondent and Respondent's counsel, totaling $49,740.66, were reasonable or not by denying Petitioner's request for production of documents and request for discovery and in so acting, acted contrary to the express criteria as set out by *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and in so doing violated Local Rule 47.8.1 of the Fifth Circuit Court of Appeals, Supporting Requirements.

After the Court entered its Order of April 29, 1983, reducing to writing the oral order from the bench of April 27, 1983, instructing the Respondent to file an affidavit by Noon, Monday, setting out reasonable expenses and attorneys' fees in preparation for trial, the Petitioner, in response to Respondent's affidavit for reasonable attorneys' fees and expenses, requested that the Court honor Petitioner's request for production of documents as pertains to the time sheets or computer entries for the time for each attorney and each witness for the Respondent so that the Petitioner could determine whether or not the amounts were reasonable using the criteria of *Johnson v. Georgia Highway Express, supra*. Petitioner also requested that the District Court allow the Petitioner sufficient opportunity to complete discovery prior to any hearing on the reasonable expense and attorneys' fees issues so that the Petitioner could depose witnesses and secure copies of necessary documents in order to be able to adequately respond. The Petitioner pointed out to the District Court her concern and alarm at the amount of time utilized to prepare for the defense of this single action case since the 344.2 hours utilized by the Respondent in preparing for trial translated into 43 8-hour working days in preparation for this individual, promotional and retaliation dis-

criminatory complaint. Petitioner's request was summarily denied by the District Court and the court in its Order of May 19, 1983, utilizing a "thor[illegible]s" test and basing its experience in handling numerou[illegible]/II cases and its observations with which Respondent's counsel prepared for trial, entered an Order without allowing the Petitioner to determine whether or not the said reasonable attorneys' fees and expenses were in compliance with criteria set forth in *Johnson v. Georgia Highway Express, supra.*

In not allowing the Petitioner to make a determination and have an evidentiary basis for the reasonable expenses and attorneys' fees, the Court not only violated the criteria set forth in *Johnson v. Georgia Highway Express, supra,* it clearly violated the Fifth Circuit Court of Appeals Local Rule 47.8.1, Supporting Requirements.

Local Rule 47.8.1 provides that attorneys' fees should always be supported by contemporaneous time records recording all work for which a fee is claimed and reflecting the hours or fractional hours of work done and the specific professional level of services performed by each lawyer for whom compensation is sought.

In addition, 47.8.1 also provides that if the reasonableness of the hours claimed on the basis of time records becomes an issue, the applicant shall voluntarily make his time records available to inspection by opposing counsel. It is clear that the Petitioner requested by proper motion and request for production of documents the time records of the Respondent's counsel but the District Court interpreted such request as a discovery with respect to "Defendent's counsel's files". This was clearly erroneous and a misinterpretation of the Petitioner's request for production of documents. Petitioner did not ask for discovery with respect to Respondent's counsel's "files". The Petitioner requested the time records that Respondent's counsel was using to support the attorney fee affidavit so that the Petitioner would be able to determine the reasonableness

of the charged fee. In this regard, the Petitioner was requesting the time records so that the Petitioner could comply with the criteria of *Johnson v. Georgia Highway Express, Supra*, and the Fifth Circuit Court of Appeals Local Rule 47.8.1, promulgated by the Fifth Circuit, effective January 1, 1983. The Petitioner stressed to the District Court that she could not determine the reasonableness of the fees without this information and that the Petitioner did question the amount of time spent by the Respondent's counsel on final preparation for trial because the 344.2 hours or 43 8-hour work days appeared to the Petitioner to be extremely excessive.

The Petitioner was not able to determine whether or not the District Court was being reasonable in using its own experience and its own knowledge of Respondent's counsel's ability in determining how much further preparation was to be utilized by Mr. Cervin, Mr. Fink and Ms. Holcomb. There is nothing in the record for the Petitioner to review, except for the Affidavit of Mr. Cervin, and there is nothing in the record for this Court to review in terms of actual preparation for retrial. Petitioner did not know what basis or the criteria the District Court was using for projecting time to be involved in the future; therefore, Petitioner had no meaningful way to determine if the amount was fair and reasonable, even if the Petitioner had the economic ability to meet the District Court's demand. The District Court did not set out the factors used by it in assessing the "thoroughness" test used as pertains to the various attorneys working on the case and in arriving at the various hours the District Court projected these lawyers would need in order to prepare for trial in the future.

The District Court was clearly erroneous in the background portion of the Court's Findings of Facts and Conclusions of Law because Petitjoner's counsel gave the District Court prior notice by advising the Court's secretary that he was in a jury trial in the Federal District Court for the Northern District of

Texas in Fort Worth.

All orders of sanctions against Petitioner's counsel were vacated, but the District Court insisted on refering to them and utilizing vacated orders, which is clearly erroneous and an abuse of discretion.

Finally, there was no evidence that the Petitioner's refusal to proceed to trial was disruptive of the District Court's docket or inconvenient to other litigants who were ready for trial.

In the Order entered April 29, 1983, in Paragraph 1, the District Court indicates that Petitioner's counsel was advised that the court would not be able to reach the case the week of April 18, and set the case for trial at 1:00 P.M., April 27, 1983, and that Petitioner's counsel made no objection to the new setting. It is correct that no objection was made by Petitioner's counsel for the new setting, but at the time that the docket was called on April 18, 1983, counsel was advised to be on a standby basis and was to be kept informed of the court's activities in the first case. This was a tentative setting. Petitioner's counsel did keep himself so informed and was advised in the latter part of the week of April 18, 1983, that the case was *tentatively* being set for Wednesday. Petitioner made no objection to this tentative setting since Petitioner's counsel was preparing to try the case. The setting actually came about when the Court advised Plaintiff's counsel at 10:00 A.M. that the case would start at 1:00 P.M. The one o'clock setting was later revised for the taking of a jury award to 2:00 P.M., at which time the court called the case for announcements.

Petitioner's attorney had advised the District Court on Tuesday that he was "in trial" in the United States District Court for the Northern District of Texas, Fort Worth Division, in Judge Belew's Court, having selected a jury and having had the jury placed "in the box", with instructions that he was to

be on call and probably would continue the trial on Thursday, April 28, 1983.

Petitioner's attorney advised the District Court on Tuesday afternoon, upon returning from Fort Worth, Texas, of his being in trial in another United States District Court. The Petitioner did not receive any further correspondence or communications from the District Court until Wednesday morning when he was advised that he was going to trial at 1:00 P.M. after being advised that Judge Belew had dismissed the jury in the case in his Court and now Petitioner's counsel was no longer "in trial" in Judge Belew's Court.

On Wednesday morning, Petitioner had filed a second set of Proposed Findings of Fact and Conclusions of Law shortly before court was to be convened and announcements taken on the case. This second set had been prepared over the weekend and on Monday, due to Petitioner's attorney's uncertainty as to which case he would be expected to try, he had prepared more detailed Proposed Findings of Fact and Conclusions of Law for the purpose of aiding the court in determining the issues in the case.

At the call of the docket on this case, Petitioner's counsel advised the District Court that he was not ready for trial and set forth three reasons, which are:

(1) The Respondent's still have the Petitioner's documents produced under the Motion to Produce and these documents have not been returned to the Petitioner so that counsel might adequately prepare for trial.

It has been Petitioner's attorney's contention that he should not have to practice law in preparing this case for trial in the office of the defense counsel. Likewise, Petitioner requested of the District Court a pared version of the documents (Appendix D at

26a) and offered to be restrained by a protective order, but the documents were still denied to the Petitioner although they were the Petitioner's documents originally.

(2) The attorney's for the Respondent refused to provide Petitioner's counsel with copies of their exhibits three days prior to trial. The initial refusal by Respondent's counsel was on April 15, 1983, at which time they wrote the District Court advising the court that they would not provide Petitioner's Counsel with the exhibits. Subsequently, the Trial Court waived the local rule requiring delivery of the documents three days prior to trial. For that reason, Petitioner's counsel announced not ready for trial since he had not waived the lcoal rule and he was being deprived of the benefit of local rules and of the Respondent's exhibits prior to trial.

(3) Petitioner's attorney was "in trial" in another Federal District Court as of Tuesday morning, and had advised the court that he was in trial.

After a telephone conference between the District Court and Judge Belew, a telephone conference to which Petitioner's counsel was not privy and which was unknown to the Petitioner's attorney at the time it occurred, Petitioner's attorney received a communication on Wednesday morning at approximately 10:00 A.M. that the jury in Judge Belew's case had been dismissed and his case had been taken from the trial docket. It was at this point in time that Petitioner's attorney was then required to immediately attempt to prepare for trial at 1:00 on Wednesday afternoon. Petitioner's counsel pointed out to the District Court that there are unwritten

> local rules of custom in the Northern District of Texas jurisdiction that pertain to trial attorneys. Petitioner's counsel reminded the District Court that he had been trying federal lawsuits and was in his nineteenth year of law practice and had on occasion, for example, in Hon. Robert M. Hill's Court, tried civil rights cases back to back. Petitioner's counsel pointed out that such had been done, not without difficulty, but nevertheless done, in an attempt to comply with the docket settings of the various Federal District Courts within the jurisdiction.

It is commonly understood in the Northern District of Texas that when a trial attorney is "in trial", that is, has picked a jury and placed the jury "in the box" in any other court that the court which wants to put him to trial must wait until he concludes the other trial. The reason for this unwritten rule is so trial attorneys can concentrate on one trial at a time if they are "in trial". It is well recognized by the trial bar in this jurisdiction that you are expected as a trial attorney to be prepared to go to trial on any given case on the docket although you may have several cases pending and although you are not number one on the docket. However, once a trial attorney is in trial, that attorney need not worry about being put to trial in another case unless the initial trial is complete, settled, or for some reason he is not able to continue the other trial. Generally, time accommodations for the final preparation and entering into the second trial are given to the attorney who has just completed or been relieved of a trial.

It is clear that the District Court called after hours and spoke with Judge Belew of the Forth Worth Division of the Northern District of Texas about Petitioner's attorney being in trial in Judge Belew's Court. Petitioner's attorney was not privy to that conversation, but only knows that at 10:00 A.M. on the following morning, Wednesday, April 27, 1983, he was ad-

vised by Judge Belew that his jury had been dismissed and his case had been removed from the trial calendar. Never in the entire practice of Petitioner's counsel has he had a jury dismissed in such a fashion. Never in the entire practice of Petitioner's counsel has he had the rights of one client, that is, the rights of the Plaintiff in Judge Belew's Court, so affected because of the dismissal of a jury that had been placed "in the box". Query? What about the damage to the Plaintiff in Judge Belew's case? Who pays for those damages? All of the time, energy and expense expended in that case by Plaintiff's counsel, the Plaintiff, the medical doctor, the expert negligence witness, in the preparation of the Plaintiff's case as well as the defense case have been affected. Who pays for that?

It is clear that the local custom intends to avoid this kind of problem. When the District Court influenced Judge Belew's decision to dismiss the jury that was placed "in the box" so that Petitioner's counsel would be in a position to go to trial in the District Court's court, this was an abuse of discretion.

Trial attorneys recognize a "pecking order" in dealing with courts. It is not unusual for a trial attorney to be set in various courts for trial at various and simultaneous times. It is understood that a Federal District Court has priority over a state district court if the attorney is not "in trial" in either court. Likewise, the same pertains as to the choice of going to trial in a state district court as compared to a county court and a county court as compared to a justice of the peace court and a justice of the peace court as compared to a municipal court. This is all clearly understood and acknowledged by the trial bar and by judges. This case is a clear reflection on the abuse of discretion by a trial court in influencing one district court to place a plaintiff's attorney in the untenable position of being in trial and then being out of trial immediately so that the attorney is forced to attempt to go to trial in another Federal District Court.

Petitioner's counsel has attached as Appendix F at 30a the *voir dire* examination conducted in Judge Belew's Court so that this Court may see that Petitioner's counsel was indeed functioning as a trial attorney immediately prior to April 27, 1983. Petitioner's counsel has attached as Appendix G at 36a a transcript of the proceeding in Judge Jerry Buchmeyer's United States District Court on the following Thursday morning, April 28, 1983, where Petitioner's counsel was acting as appointed counsel in an illegal alien case. These appendices are attached so that this Court may understand that Petitioner's counsel was not insane or mentally incompetent at the time that he announced not ready for trial.

The District Court in its oral ruling on April 27, 1983, and in its written ruling of April 29, 1983, indicated that Petitioner's counsel was being fined $2,000.00 as a sanction under Rule 41(b). The District Court mentioned "disrespect" of the Court and set out sanctions fining Petitioner's counsel. However, it was not clear as to whether or not the actions sanctioned were civil contempt since Petitioner's counsel was to pay the fine to the United States Government through the office of the clerk. If the sanctions imposed by the District Court were equivalent to contempt, Petitioner's attorney needed to know whether or not the contempt was civil or criminal because Petitioner's counsel was severely punished by the District Court without a hearing. The District Court made the decision that Petitioner's counsel had acted in bad faith, a severe judgment that has potential damage to Petitioner's counsel since such a bad faith finding may provide a basis for disciplinary action by the Bar Association, foreclose opportunities for Petitioner's counsel to be apppointed or to be elected to public office, particularly since Petitioner's counsel had served as Judge of Dallas County Court at Law No. 3 in Dallas County, Texas, and might do damage to Petitioner's counsel's practice and his reputation generally in the legal community.

Although the District Court vacated all of its Orders pertaining to the civil or criminal contempt, and the sanctions, such vacating did not and does not remove the "chilling effect" that the District Court's action has on Petitioner's counsel and the Petitioner in this case.

The actions of the District Court in dismissing the case were clearly an abuse of discretion and are clearly erroneous and should be reversed. 18 USCS Section 401. 401(1), 401(2), 401(3): 18 USCS Section 402; Fed. Rules Civ. Proc. Rule 41(b); Fed. Rules CR P Rule 42(a); Local Rules, Northern District of Texas, Dallas Division, Rule 4.3, 8.4 and 13.2; *Anderson v. Dunn, 19 U.S. 204, 5 L. Ed. 242 (1821); Harris v. United States*, 382 U.S. 162, 15 L. Ed. 2d. 240, 86 S.Ct. 352 (1965); *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965) *cert. den.*, 384 U.S. 929, 16L.Ed 2d. 532, 86 S.Ct. 1445; *Nilva v. United States*, 352 U.S. 385, 1 L. Ed. 2d. 415. 77 S.Ct. 431 (1957), *reh. den.*, 353 U.S. 931, 1 L.Ed. 2d 724, 77 S.Ct. 716; *Offutt v. United States*, 348 U.S. 11. 99 L. Ed. 11, 75 S.Ct. 11 (1954); *Ungar v. Sarafite* 376 U.S. 575, 11 L. Ed. 2d. 921, 84 S.Ct. 841, (1964) *reh. den.*, 377 U.S. 925, 12 L. Ed. 2d. 217, 84 S.Ct. 1218.

The District Court was attempting to determine whether or not the Petitioner could have borrowed the money in May of 1983 to pay the amount assessed and in so doing attempted to reconstruct the Petitioner's ability to pay. However, the time period to be utilized as to whether or not the Petitioner had the ability to pay is the current time period, that is, after June 18, 1984, when the case was reversed and remanded, not at the time that the case was ongoing. Up until June 18, 1984, the Petitioner was operating under the District Court's orders which were subject to appeal and which were appealed. Likewise, the Petitioner was following the advice of her counsel who had indicated to her that in his opinion the case would be reversed and the dismissal would not be allowed because

she did not have the ability to pay the monies ordered. In fact, this happened. The District Court, based on the affidavit of an interested party, to wit, the Respondent's credit union employee, has determined that the Petitioner could have paid the monies she was ordered to pay.

Therefore, the District Court has utilized the wrong period of time for determining whether or not the Petitioner could have paid or had the ability to pay. The relevant time period is after May 24, 1984, not prior to the appeal.

The Petitioner offered to pay $100.00 per month, or offered to pay a greater sum if the District Court would so order. This offer by Petitioner's counsel in the hearing of July 29, 1984, clearly indicates the Petitioner's intent in not wanting to willfully violate the District Court Order.

Prior to the giving of Notice of Appeal on the first appeal the Petitioner offered to pay the Respondent the sum of $100.00 per month but the offer was summarily rejected by Respondent. The Respondent took the position that the District Court's Order of May 19 was superseded by the Order of Dismissal entered on May 27, 1983.

The Respondent stated:

> Accordingly, there presently is no award of attorneys' fees outstanding. Apparently implicit in your proposal was necessity for my client to request that the Court vacate its Order of Dismissal and reinstate its award of attorneys' fees.

Therefore, even though the Petitioner was attempting to comply with the Order of the District Court prior to having the Order reviewed on appeal, the Respondent's posture was that there were no attorneys' fees due and owing and no amount of money, not even the correct amount of $5,701.43, would be acceptable to the Respondent.

CONCLUSION

For all of these reasons, the Petitioner requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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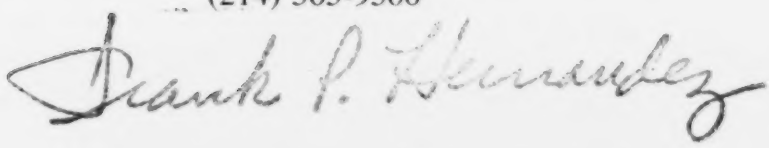

Frank P. Hernandez

Attorney for Petitioner,
Dorethea N. Hornbuckle

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-1435

DOROTHEA N. HORNBUCKLE,
Plaintiff-Appellant,

v.

ARCO OIL & GAS COMPANY,
Defendant-Appellee.

May 24, 1984

In an employment discrimination case, the United States District Court for the Northern District of Texas, Barefoot Sanders, J., dismissed the complaint when plaintiff failed to pay amount ordered as sanction for failure to proceed with trail on scheduled date. Plaintiff appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) district court was justisfied in imposing reasonable sanctions on plaintiff's attorney who failed to notify court in advance that he intended, despite scheduled trial, to attempt to proceed with trial in another city, and (2) since record did not disclose that trial judge considered any alternative sanction for plaintiff's unjustified failure to proceed to trial other than ordering payment of defendant's fees and expenses, or that judge determined that the sanction was one that plaintiff was capable of performing, case would be remanded for express findings concerning whether plaintiff had ability to pay sum assessed as alternative to dismissal, and if not, whether any sanctions less

severe than dismissal, including those that might be assessed against her counsel, would be appropriate and sufficient.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, RUBIN and POLITZ, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

When the trial court reached this employment discrimination case, the plaintiff's lawyer simply refused to start the trial. The court ordered the plaintiff to reimburse the defendant those fees and expenses incurred in preparation for the scheduled trial that had been, in effect, wasted as a result of the necessity for rescheduling the trial. When she failed to do so, the court dismissed the suit. The plaintiff protests that she is financially unable to pay the amount ordered and that the order was therefore impossible for her to perform. Affirming the trial judge's power to impose sanctions on either counsel or client, as may be appropriate, we remand the case so that the trial court may assess the plaintiff's ability to pay the sum ordered and, if she cannot, to consider the appropriateness of other sanctions against her or her counsel.

I.

Dorothea N. Hornbuckle, a black female who was employed by Arco Oil & Gas Company as its Equal Opportunity Affairs coordinator, contends that Arco discriminated against her on the basis of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. While working for

Arco, Hornbuckle had access to confidential company information and documents. After her suit was filed, Arco requested that she produce at an oral deposition all documents that she had obtained in the course of her employment. After some delay, Hornbuckle produced 4,000 pages of such documents. Hornbuckle's deposition was taken at exhaustive length. She was interrogated for eight days and questioned about individual documents in wearisome detail. She testified that she had taken some of these documents home and had inadvertently failed to return them. Others were her own notes about company matters on which she had worked, some made during working hours at Arco's office and some made at home. Arco assered its right to retain these documents, but the company did offer to make them available for examination by Hornbuckle's lawyer, Hernandez. The magistrate ordered that the documents be returned to Hornbuckle because Arco's counsel had obtained them by representing to Hernandez that they would be returned after Hornbuckle's deposition. The court, however, ruled that Arco had a right to keep the documents, though it must make them available to Hornbuckle for review during reasonable hours.

The discovery proceedings continued to be tendentious, and, in the course of them, the district court imposed sanctions on Hornbuckle for her failure to comply with discovery requests. Trial was set in the busy district court for June 21, 1982. On June 11, Hornbuckle sought a continuance, which resulted in trial being rescheduled for November 29. A month before the new date, Hornbuckle sought another continuance, and the trial was set for the week beginning April 18, 1983. Eleven days before that date, Hornbuckle sought yet another continuance. This was denied. Due to the scheduling of other trials, however, the court was unable to begin the trial on April 18; it informed counsel that it would carry the case on the docket until the next week. The court later advised counsel

that the trial would begin on April 27 at 1:00 p.m. Hernandez, Hornbuckle's lawyer, did not object.

Hernandez was also counsel in a case scheduled to be tried on April 26 in federal district court in Fort Worth. He had never informed either judge of a possible schedule conflict. On April 26, he simply announced to the judge in Fort Worth that he was ready for trial in that case. The Fort Worth court's calendar was also busy, so the judge suggested that a jury be selected in Hernandez's case and then excused pending trial to begin a day or two later. Hernandez told the court that this "will be fine with me." Accordingly, on April 26, a jury was selected for the Fort Worth case, and all parties were notified that the trial would begin as soon as the case could be reached.

Later that day, Hernandez telephoned the Dallas court to say he was "in trial" in Fort Worth. Upon receiving his message, the Dallas judge telephoned the Fort Worth judge and informed him of Hernandez's earlier commitment in Dallas. The Fort Worth judge then agreed to continue the Fort Worth trial and excused the jury that had been selected so that the Dallas trial might proceed as scheduled. Hernandez complains that he was not privy to the conversation between the two judges, but it is apparent that their sole purpose was to eliminate the conflict that he had created. The next day, Wednesday, April 27, the Fort Worth court notified Hernandez that the jury in the Fort Worth case had been dismissed and the case taken from the trial docket.

The next day, Wednesday, April 27, Hernandez filed in the Dallas court proposed findings of fact and conclusions of law relating to the Dallas case without any indication that he was not prepared for trial. But when the Hornbuckle case was called for trial later that day, Hernandez announced that he would not commence even at the risk of dismissal of the case, because (1) he had been unable to recover the documents that

had been given to Arco, (2) Arco's counsel had not delivered to him copies of its trial exhibits, and (3) he was unable to "shift gears" from his involvement in the Fort Worth case. The Dallas court did not think any of Hernandez's reasons sufficient to justify his refusal to start trial. The court stated that it had communicated with the judge in Fort Worth, and that the Fort Worth case would be continued so that the previously scheduled Arco case might proceed.

Arco moved to dismiss Hornbuckle's case. The court entered an order finding that Hernandez's reasons for refusing to go to trial "are not valid and not made in good faith" and that Arco "was ready for trial, with witnesses present in the courtroom and other witnesses en route from distant parts of the United States." The court found not only that Hernandez's refusal to go to trial was disruptive to the court's docket and occasioned inconvenience to other litigants, but also that his conduct "throughout the course of his litigation has been unacceptably dilatory," His refusal to proceed was adequate grounds for dismissal of the suit. Instead, however, the court fined Hernandez $2,000, to be paid from his personal funds; fined Hornbuckle $250 as a sanction for failure to respond to discovery interrogatories;[1] and ordered her to pay the reasonable expenses and attorney's fees incurred by Arco in preparing for trial. (The order required Arco to file an affidavit specifying such expenses and fees and afforded Hernandez a chance to reply.) A few days later, the court on its own motion reduced Hernandez's fine to $1000.

Arco's lawyers filed an affidavit stating that they had spent 344.2 hours preparing for trial and stating that the fees and expenses incurred in preparation amounted to $49,740.66. Arco asked for 15% of its total fees and expenses, $7,461.10,

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[1] Hornbuckle paid the $250 imposed as a discovery sanction, and she does not challenge that ruling.

if the case were rescheduled for trial "within a few weeks" and 40%, $20,117.69, if the case were set for trial "more than several months" from the date of its affidavit. Hornbuckle countered with a motion to examine the time records of Arco's counsel. On May 19, the district court entered an order stating that ample grounds had existed to dismiss the case on April 27 for want of prosecution, but that it had elected to give Hornbuckle the opportunity to avoid dismissal by reimbursing Arco for fees and expenses incurred in preparation for the scheduled trial.

The court denied Hornbuckle's motion for discovery of opposing counsel's time files because this was directed to questioning the total amount of time spent in preparation. Instead, the court awarded fees only for the time that would be required to prepare again for trial, which it said it could not reach until the next January. In fixing this amount, it did not rely on the time records of Arco's counsel, but on its own experience in handling Title VII cases and its observation of the thoroughness of counsel's efforts. On this basis, the court found that the three Arco lawyers would be required to spend a total of 44 hours to prepare for trial when the case was again reached, fixing their fees at $5480 and expenses at $221.43. Instead the court found that the hourly rates (which were not, apparently, questioned) were reasonable and in accordance with currently charged rates for similar legal services in Dallas and that the out-of-pocket expenses were reasonable. Because it was assessing these fees and expenses against Hornbuckle, the court vacated the fine of $1000 against Hernandez. The order concluded by stating that, if the sum was not paid by noon May 27, the complaint would be dismissed with prejudice. On May 27, it entered such a dismissal.

Hornbuckle filed a motion to vacate the dismissal on the ground that she was financially unable to pay the sum fixed by the court and also challenging the basis on which the court

had determined the amount of duplicative preparation that would be required for the new trial. Arco countered with an affidavit that Hornbuckle's gross earnings for 1982 and her projected salary for 1983, exclusive of fringe benefits, exceeded $35,000 in each year. Without any further statement of the reasons for its action, the court denied Hornbuckle 's motion for relief from the judgment of dismissal.

II.

[1,2] While no judge who has, as a lawyer, personally tried law suits can fail to be sympathetic to the burdens that a heavy litigation practice places on counsel, this court insists that trial lawyers are obligated to undertake no more responsibility than they can responsibly handle and to be candid with courts about scheduling problems that nevertheless arise. Every trial court in this circuit has more cases than the most diligent judge can reach. If, after reasonable notice that a case has been scheduled for trial on a date counsel has announced he will be ready, he is unable to proceed with a trial, the other parties are put to needless expense, the court is inconvenienced, and, worst of all, valuable trial days are irretrievably wasted. For it is impossible to apply scheduled but unused trial time to other cases awaiting trial. Trial courts therefore have both the power and the duty to take measures to control their dockets and to ensure that counsel properly prepare cases scheduled for trial so that they can be tried and decided rather than continued and rescheduled.[2]

[3,4] The unjustified failure of a litigant to proceed to trial on a regularly scheduled date may be punished by the imposition of reasonable sanction. Fed.R.Civ.P. 41(b). Whether a sanction should be imposed and, if so, how severe it should

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[2] *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 627-34, 82 S.Ct. 1386, 1387-90, 8 L.Ed.2d 734, 736—40 (1962); *Burden v. Yates*, 644 F.2d 503 (5th Cir. 1981).

be are matters for the trial court to decide, and it is accorded a broad discretion with regard to both.[3] The ultimate sanction for the litigant is dismissal of his case with prejudice. This most extreme penalty should be imposed only after full consideration of the likely effectiveness of less-stringent measures.[4]

[5] Hernandez demonstrated disregard for both orderly procedure and his responsibilities as a member of the bar. He failed to notify the Dallas court in advance that he intended, despite its schedule, to attempt to proceed with a trial in Fort Worth. He failed also to notify the Fort Worth judge of his trial problems. He apparently thought he had a right to keep both cases proceeding simultaneously without full disclosure to either judge, on the basis, as expressed in oral argument to us, "I'm gonna go to trial in the district court where I can go to trial." It is not an unfair inference that his choice of going to trial in Fort Worth rather than Dallas may have been his solution to the Dallas court's refusal to grant another continuance. The district court was, and still is, justified in imposing reasonable sanctions on him for his dereliction.

[6,7] When lesser sanctions have proved futile, a district court may properly dismiss a suit with prejudice.[5] The record

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[3] *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291 (5th Cir.1983), *modified on other grounds* 722 F.2d 209 (5th Cir.1984), *cert. denied*, — U.S. — 104 S.Ct. 975, 79 L.ED.2d 213 (1984); *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 385 (5th Cir.1978); *Lopez v. Aransas County Independent School District*, 570 F.2d 541, 544 (5th Cir. 1978).

[4] *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir.1982); *Harrelson v. United States*, 613 F.2d 114 (5th Cir.1980); *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir.1976) *cert. denied*, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

[5] *See, e.g., National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291 (5th Cir.1983) *modified on other grounds*, 722 F.2d 209 (5th Cir.1984), *cert. denied*, — U.S. —, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984); *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230-31 (7th Cir.1983); *Hejl v. State of Texas*, 644 F.2d 1273 (5th Cir.) *cert. denied*, 456 U.S. 933, 102 S.Ct. 1987, 72 L.Ed.2d 452 (1982); *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir.1976), *cert. denied*, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

does not disclose, however, that the trial judge considered any alternative sanction other than payment of $5701.43 by Hornbuckle, or that the judge determined that alternative to be one that Hornbuckle was capable of performing. When a district court dismisses an action with prejudice for counsel's failure to prosecute, such findings of fact are essential for our consideration of the inevitable argument that the dismissal was an abuse of its discretion.

[8] Accordingly, without in any way faulting the district court, whose patience was indeed tried, we remand the case for express findings concerning whether Hornbuckle had the ability to pay the sum assessed as an alternative to dismissal, and, if not, whether any sanction less severe than dismissal, including those that might be assessed against counsel,[6] would be appropriate and sufficient.

[9,10] The other issues raised on appeal are without merit. The district court might properly base an award of sanctions on its own factual determination. There was no necessity for analysis of the fees assessed accoring to the criteria in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 717-19 (5th Cir. 1974), for the reasonable hourly rate was not challenged and the only other factor in computing the sanction was the number of hours that would be required by counsel to prepare again for trial nine months after the originally scheduled date. Inspection of the time files of Arco's counsel would not disclose evidence relevant to the appropriate award, for the issue before the court was not how much time had been spent but how much time would be required in the future. The determination that the documents in Hornbuckle's possession were Arco's

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[6] *See Rogers v. Kroger Co.*, 669 F.2d at 322; *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 557 (5th Cir. 1964). Federal courts have inherent power to assess expenses against counsel who willfully abuse judicial process. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980).

property was supported by the record.

The judgment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-5028

DORETHEA N. HORNBUCKLE,
Plaintiff-Appellant,

v.

ARCO OIL & GAS COMPANY,
Defendant-Appellee.

May 24, 1984

In employment discrimination case, the United States District Court for the Northern District of Texas, dismissed complaint when plaintiff failed to pay amount ordered as sanction for failure to proceed with trial on scheduled date. Plaintiff appealed. The Court of Appeals, 732 F.2d 1233, reversed and remanded. On remand, the District Court, Barefoot Sanders, J., again dismissed action, and appeal was taken. The Court of Appeals held that ultimate sanction was warranted based upon finding that employee had ability to pay amount ordered as sanction but had failed to do so.

Affirmed.

Federal Civil Procedure — 1758

Ultimate sanction of dismissal for failure to prosecure Title VII [42 U.S.C.A. § 2000e et seq.] employment discrimination case was warranted, where alternative sanction of payment of $5701.53 was assessed against employee, and employee had ability to pay sanction but failed to do so. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

Dorethea Hornbuckle appeals for the second time from the district court's dismissal of her Title VII suit as a sanction for failure to prosecute. On her first appeal, a panel of this Court reversed the district court's judgment and remanded the case to the trial court "for express findings concerning whether Hornbuckle had the ability to pay the sum assessed as an alternative to dismissal, and, if not, whether any sanction less severe than dismissal . . . would be appropriate and sufficient." *Hornbuckle v. ARCO Oil & Gas Co.*, 732 F.2d 1233, 1237 (5th Cir. 1984).

In accordance with this Court's instructions, upon remand the district court made detailed findings of fact and again dismissed Hornbuckle's suit. We conclude that the district court's judgment is based on findings of fact which are not clearly erroneous and that no error of law appears. Accordingly, for the reasons set forth in the district court's judgment, which we attach as an appendix to this opinion, we affirm.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is before the Court on remand from the Court of Appeals for certain express findings regarding the basis for dismissal of this suit.

Background

This case was called for trial on April 27, 1983, after having been continued twice at Plantiff's request. Without prior notice to the Court, Plaintiff's counsel, Mr. Frank Hernandez, refused

to proceed. The Court found that the reasons given for the refusal were not valid or made in good faith, and that Mr. Hernandez's conduct throughout the course of the litigation had been unacceptably dilatory. Plaintiff's refusal was disruptive of the Court's docket and inconvenient to the other litigants who were ready for trial. *See* Order, dated April 29, 1984.

Plaintiff was ordered to reimburse the Defendant those fees and expenses incurred in preparation for the scheduled trial. When Plaintiff failed to do so, the Court dismissed the suit. *See* Order, dated May 27, 1983. On appeal, the Court's power to impose sanctions was affirmed, but the case was remanded "for express findings concerning whether Hornbuckle had the ability to pay the sum assessed as an alternative to dismissal, and, if not, whether any sanction less severe than dismissal, including those that might be assessed against counsel, would be appropriate and sufficient." *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233, 1237 (5th Cir.1984). In order to make the necessary findings, this Court established a schedule for discovery limited to information regarding Plaintiff's ability to pay the sanctions imposed by the Court. *See* Orders dated July 30, 1984, and October 1, 1984.

In addition to the record from the original proceedings, the following documents are before the Court:

1. Defendant's Interrogatories and Request for Production of Documents and Things on the Issue of Ability to Pay Monetary Sanction;
2. Defendant's Request for Admissions on the Issue of Ability to Pay Monetary Sanction;
3. Defendant's Second Request for Production of Documents and Things on the Issue of Ability to Pay Monetary Sanction;
4. Plaintiff's Answers to Defendant's Interrogatories and

Request for Production of Documents and Things on the Issue of Ability to Pay Monetary Sanction, with Attachments;

5. Plaintiff's Response to Defendant's Second Request for Production of Documents and Things on the Issue of Ability to Pay Monetary Sanction;

6. Plaintiff's Response to Defendant's Request for Admissions;

7. Original Deposition and two hand-written pages of corrections of Dorethea N. Hornbuckle, dated September 19, 1984;

8. Original Deposition of Jesse James Hornbuckle, Jr., dated September 19, 1984;

9. Original Deposition of Patrick G. Calhoun, dated October 8, 1984.

Pursuant to the instructions of the Court of Appeals and upon consideration of the evidence, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. At the time of the filing of this lawsuit in September 1981, Plaintiff was employed as a professional in Defendant's Employee Relations Department in salary grade 4412, earning $1315.56 bi-weekly. (D. Hornbuckle Dep. (Original Proceeding), Vol. I, at 27, 117). In calendar year 1982, she received gross wages in excess of $36,000 (Blaylock Affidavit, Ex. 2).

2. When the Court assessed the monetary sanction on May 19, 1983, Plaintiff was earning $1,506.06 bi-weekly. Her gross wages for calendar year 1983 were approximately $39,300 (Blaylock Affidavit, Ex. 3). As of April 12, 1984, Plaintiff was compensated at a gross bi-weekly wage rate of $1,565.30 (Blaylock Affidavit, Ex. 4).

3. Plaintiff maintained an account with the Atlantic Richfield Thrift Plan (the "Thrift Plan"), a tax-qualified profit-sharing plan. Pursuant to the plan's terms, Defendant contributed to Plaintiff's account an amount equal to the contributions which she authorized, up to a maximum of four percent of her wages. (Bengtson Affidavit, ¶ 4). Hornbuckle contributed $1,124.53 to the Thrift Plan in calendar year 1982. (Blaylock Affidavit, Ex. 5, 6).

4. Plaintiff terminated her membership in the Thrift Plan effective July 23, 1982. At that time, she received U.S. Savings Bonds, the cost basis of which was $2,200. She also received a cash payment of $6,523.01. (Bengston Affidavit, ¶¶ 13, 14, 15).

5. On January 1, 1983, Defendant established the Atlantic Richfield Savings Plan (the "Savings Plan"), which was similar in purpose to the prior Thrift Plan. When Plaintiff enrolled in the Savings Plan on January 1, 1984, she agreed to contribute two percent of her wages into her member account and, in accordance with the terms of the Savings Plan, Defendant contributes four percent of her wages into her company account. (Bengtson Affidavit, ¶ 16). As of July 19, 1984, Hornbuckle had contributed $464.05 into her member account. (Blaylock Affidavit, Ex. 8).

6. Plaintiff enrolled in the Atlantic Richfield Capital Accumulation Plan (the "CAP") when it was initiated by Defendant on January 1, 1983. (Bengtson Affidavit, ¶¶ 5, 18). The CAP is a voluntary deferred compensation plan which provides employees the opportunity to accumulate a specified percentage of their gross pay and to defer payment of federal income tax for such accumulated earnings. Defendant automatically contributes one percent of each employee's gross earnings into the employee's ÇAP company account. At the time of her enrollment, Plaintiff agreed to defer receipt of six percent of her wages to be deposited into her CAP member account.

(Bengtson Affidavit, ¶¶ 5, 18). In 1983, Plaintiff authorized $3,930.64 to be deposited into her CAP member account. (Blaylock Affidavit, Ex. 7). Thereafter, through July 19, 1984, Plaintiff deferred receipt of an additional $1,392.14 to be deposited into her CAP member account. (Blaylock Affidavit, Ex. 8).

7. Plaintiff participated in the Atlantic Richfield Employee Stock Ownership Plan (the "ESOP") by authorizing deductions from her salary as payment for the purchase of shares of ARCO common stock. The terms of the ESOP require ARCO to contribute automatically a specified percentage of each employee's wages into an ESOP account, and to contribute an amount equal to all contributions authorized by each employee. (Bengtson Affidavit, ¶ 6). Plaintiff contributed into her ESOP account $188.00 in 1982; $326.00 in 1983; and $416.10 in 1984 through July 19. (Blaylock Affidavit, Ex. 5-8).

8. Plaintiff also authorized other voluntary deductions from her gross earnings. A substantial percentage of all of her voluntary deductions each year has been for tax deferment or deferred compensation benefit plans, as shown below for the specified time periods:

	Total Voluntary Deductions	Total Deductions for Savings, Thrift, CAP, and ESOP
Year		
1982	$5,294.47	$1,312.53
1983	$9,627.84	$4,256,64
1/1-84–7/19/84	$5,730.63	$2,272.29

(Blaylock Affidavit, Exs. 5-8).

9. Plaintiff's participation in the thrift, savings, capital accumulation, and stock ownership plans, and her management of the substantial attendant discretionary contributions, evidence both a degree of financial sophistication and an ability

to direct her resources.

10. Plaintiff's husband has been employed by Trailways, Inc. for the past 17 years. (J. Hornbuckle Dep. at 13). In 1980, he accepted a position as a manager of Trailways' Accounts Receivable Department at an annual salalry of $25,000. (J. Hornbuckle Dep. at 14, 16). In October 1983, he received a raise which increased his gross wages for calendar year 1983 to over $26,700. (J. Hornbuckle Dep. at 17, Ex. 2).

11. Dorethea and Jesse Hornbuckle's gross earnings totalled $61,041.24 in 1982, and $66,015.94 in 1983). (Blaylock Affidavit Exs. 1-3; J. Hornbuckle Dep. at 16-17, Ex. 2) The Court finds that such amounts are not insubstantial, and that Plaintiff was and is not impecunious.

12. The Hornbuckles own a private residence located at 1824 Kirnwood Drive, Dallas, Texas. The home consists of three bedrooms, a den, living room, a kitchen, two bathrooms, and a two-car garage. The outstanding loan balance on the home, at the close of 1983, was approximately $20,800. Their monthly mortgage payment is $278.00. (Plaintiff's Answers to Defendant's Interrogatories and Request for Production of Documents and Things, Nos. 9, 31, 36 and attached documents).

13. The Hornbuckles at material times have owned two automobiles: a 1979 Chevrolet Monte Carlo and a 1976 Plymouth Volare. Other personal assets of significant value include a fur jacket, purchased sometime in 1980 or 1981, which Plaintiff values at $1,800. (Plaintiff's Answers to Defendant's Interrogatories and Request for Produciton of Documents and Things, No. 14; D. Hornbuckle Dep. at 22-23).

14. The Hornbuckles own approximately $500 worth of stock of the Sunbelt National Bank, and 25 shares of common stock of ARCO. (Plaintiff's Answers to Defendant's Interrogatories and Request for Production of Documents and

Things, No. 15). As of May 4, 1983, the shares of ARCO were worth approximately $1,144. (Bengtson Affidavit, ¶ 19).

15. The Hornbuckles had several checking and credit union accounts which exhibited substantial deposit and withdrawal activity. The daily balances in these accounts often fluctuated significantly. However, at the time of the Court's Order assessing the monetary sanction, the Hornbuckles had at least $2,465 in cash or assets which could be readily converted to cash. In addition to the $1,644 worth of stock already noted, Plaintiff had approximately $203 in her Atlantic Federal Credit Union savings account as of May 27, 1983; and the balance in Plaintiff's checking account at RepublicBank Dallas as of May 23, 1983, was $619. Furthermore, as of September 30, 1983, Jesse Hornbuckle had a cumulative share balance of $1,627 in his Trailways Credit Union sub-accounts. (Plaintiff's Answers to Defendant's Interrogatories and Request for Production of Documents and Things, and attached documents).

16. Under the terms of the Atlantic Richfield Capital Accumulation Plan, a participant may withdraw funds from his or her account upon a showing of financial hardship. (Bengtson Affidavit ¶ 5). As of May 4, 1983, Plaintiff had 15.682 shares of ARCO common stock in her Atlantic Richfield CAP member account, and 2.492 shares in her CAP company account. The aggregate value of these shares was $831.46. (Bengtson Affidavit, ¶ 19).

17. Plaintiff's efforts to obtain sufficient sum of money to satisfy the sanction imposed in May 1983 were: (a) a review of bank and other savings records to determine the amount of cash assets, and (b) a telephone inquiry to the Credit Union to determine the possibility of a loan. (D. Hornbuckle Dep. at 41). Plaintiff made no effort to withdraw funds from her CAP account (D. Hornbuckle Dep. at 21); to enlist her husband's aid in raising the needed amount because of his blemished credit status (D. Hornbuckle Dep. at 41, 54-57; J.

Hornbuckle Dep. at 24-26); to borrow from friends or relatives (D. Hornbuckle Dep. at 41); or to sell any personal property (D. Hornbuckle Dep. at 41).

18. Plaintiff is a member of the Atlantic Federal Credit Union (the "Credit Union"), a federally chartered financial institution (Calhoun Dep. at 9). Before the entry of the Court's Order assessing the sanction, Plaintiff had obtained unsecured loans from the Credit Union. In July 1982, she obtained an unsecured loan for $1,000, and her line of credit was adjusted to the same amount. In January 1983, she borrowed $3,500, and her line of credit was increased to $5,000 to cover her then current outstanding loan balances of $4,336.85. (Calhoun Dep., Exs. 6, 7).

19. Plaintiff states that, in accordance with her usual practice when seeking a Credit Union loan, she telephoned the Credit Union to inquire about borrowing the $5,700 sanction amount. She was told that she did not have a line of credit to cover borrowing an additional $5,700. (D. Hornbuckle Dep. at 33-34, 37-38). Although Patrick Calhoun, the Credit Union vice-president testified that Credit Union employees are instructed to refrain from commenting in telephone conversations with respect to a member's entitlement to credit, and that employees simply advise members seeking an extension of credit to complete an application form (Calhoun Dep. at 49-50), the information claimed to have been received by Plaintiff was consistent with the $5,000 credit limit which had been established in January 1983. She did not pursue the loan through personal conference with a Credit Union officer or by making the written application required for any loan. (D. Hornbuckle Dep. at 34). Credit Union records reflect neither an inquiry nor an application with respect to the $5,700 amount. (Calhoun Dep. at 35-36).

20. Pursuant to the policies of the Credit Union, a member may obtain an unsecured signature loan which varies in amount

based upon length of membership and the member's salary. (Calhoun Dep. at 19-20, Ex. 3). Based upon Plaintiff's length of membership in the Credit Union and her salary in May 1983, Plaintiff would have been entitled at the time of the sanction Order to borrow $9,789.39, less any outstanding loan balances. (Calhoun Dep. at 34).

21. Thus, while her available credit limit was stated to be $5,000 prior to November 1983, Plaintiff had actually been eligible for a credit limit in excess of $9,000 since 1982. To obtain this higher credit limit, she would have had to file a new master credit application. She did complete such an application in November 1983, and her credit limit was raised to $9,900. (Calhoun Dep. at 29-31).

22. In May 1983, Plaintiff had an outstanding loan balance of $3,734.12. Deducting this amount from Plaintiff's available line of credit, Calhoun concluded and the Court finds that Plaintiff would have been eligible to borrow up to $6,055.27 in May 1983. (Calhoun Dep. 35). The Credit Union had funds available to be lent at that time. (Calhoun Dep. at 32). By August 17, 1984, Plaintiff had loans totaling $13,180.88 from the Credit Union (D. Hornbuckle Dep. at 36).

23. In evaluating an applicant's entitlement to an unsecured signature loan, a Credit Union loan officer would consider the additional factor of the applicant's credit rating. (Calhoun Dep. at 20-21). With one exception, Plantiff's credit reports were consistently favorable. (Calhoun Dep. at 39-42, Ex. 6-B, 6-C). The one exception concerned a report from a Dallas area credit bureau indicating that Plaintiff had failed to pay an outstanding bill for $86.00 to a physician. On the basis of that adverse report, Plaintiff's July 8, 1982, request for a loan for $1,000 from the Credit Union was initially rejected. On July 12, 1982, Plaintiff paid the physician's statement. She then renewed her loan request, and the $1,000 amount she sought was approved and funded on July 14, 1982. (Calhoun Dep. at 36-38, Ex. 6,

6-A, 6-B).

24. The adverse credit entry last appeared on a report obtained by the Credit Union on January 19, 1983, at the time Plaintiff borrowed an additional $3,500. The copy of the report in the Credit Union's files was annotated to indicate that the problem item had been taken care of. All subsequent reports in Plaintiff's account file indicated that she had an excellent credit rating. (Calhoun Dep. at 39-46, Exs. 6-B, 6-C, 8, 9). Credit reports obtained by Neal Bondy, AOGC's Employee Relations Manager, from two separate credit reporting services also showed that Plaintiff had an unblemished credit record. (Bondy Affidavit, ¶¶ 3, 4, 5). While there is no credit report in Plaintiff's Credit Union account file obtained in May 1983, Calhoun explained that numerous reports might have been obtained, but only those with adverse information are retained for a long-term period as specified by law. (Calhoun Dep. at 68-70). It is therefore properly inferred that in May 1983, Plaintiff had a good credit rating, as commercially reported in the ordinary course of business.

25. According to the reports obtained by Bondy, Plaintiff opened credit accounts with the following companies between September 1982 and April 1984; Saks Fifth Avenue, Bloomingdale's, American Airlines, Mervyn's, Marshall Fields, Corrigan's, Neiman-Marcus, Republic National Bank MasterCard, and General Electric Credit Center. (Bondy Affidavit, ¶ 6). In addition to the foregoing, the Hornbuckles had active charge accounts in 1983 at Montgomery Ward, Lester Melnick, Bag'n Baggage, Macy's, Jas. K. Wilson, Gimbels, Preferred Shoppe, American Express, and Bergdorf Goodman. (Plaintiff's Answers to Defendant's Interrogatories and Request for Produciton of Documents and Things, No. 38).

26. Plaintiff has otherwise accessed various credit sources. In September 1982, she made a bank credit transaction with Republic National Bank in the amount of $2,236 (including

principal and interest). (Bondy Affidavit, ¶ 7). In March 1984, she received a loan from Republic National Bank Oak Cliff for the amount of $1,553 (including principal and interest), and from Republic National Bank in July 1984, for $2,987 (including principal and interest). (Bondy Affidavit, ¶ 7).

27. Just two days before Plaintiff was required to pay the monetary sanction in order to preserve her Title VII claim against Defendant, she made written application for a Credit Union loan of $300. The Credit Union approved and funded her application on May 25, 1983. (Calhoun Dep., Ex. 6-D, 7-A). Calhoun noted that it was unnecessary to increase Plaintiff's credit limit at the time, because her total loans still did not exceed her stated $5,000 limit. (Calhoun Dep. at 92).

28. Thereafter, Plaintiff's Credit Union borrowing activity increased substantially. On August 4, 1983, she requested and obtained a loan for $600. (Calhoun Dep. Ex. 6, 7). Another request by Plaintiff for a loan was granted on November 16, 1983, in the amount of $1,209.31. (Calhoun Dep. Ex. 6, 7). On November 30, 1983, Plaintiff submitted an application for an unsecured loan of $1,500. The loan was duly approved, and because the total amount borrowed then exceeded the stated $5,000 credit limit, the limit was increased to $9,900. An additional loan request for $600, made on December 27, 1983, was also approved. (Calhoun Dep. Exs. 6, 6-E, 7).

29. Plaintiff continued to borrow against her Crediit Union line of credit in 1984. On February 7, 1984, she requested and obtained an unsecured loan for $300. (Calhoun Dep. Ex. 6, 7). At Plaintiff's request, this loan was increased on March 15, 1984, by the amount of $1,434.90. Plaintiff again borrowed from her line of credit in the amount of $1,661.24 on May 11, 1984. She borrowed another $501.08 on August 23, 1984. (Calhoun Dep., Ex. 6, 7).

30. The numerous unsecured loans which were extended

to Plaintiff following the Court's imposition of the monetary sanction clearly establish that her credit rating would not have precluded her from obtaining a loan for $5,700 from the Credit Union in May 1983. (Calhoun Dep. at 45-46). Based upon the Credit Union's established repayment policies, Plaintiff would have paid a bi-weekly amount of $43.39, or its monthly equivalent, $94.01, to service a $5,700.00 loan. (Calhoun Dep. at 53-54).

31. The financial data and other documentation considered by the Court produces a meaningful pattern of Plaintiff's earnings, asset accrual and disposition, expenses, credit transactions, and borrowing ability, all of which directly bear on her ability to pay the sanction.

32. Upon the refusal of Plaintiff's counsel to proceed to trial in April 1983, Defendant sought dismissal of this suit pursuant to Fed.R.Civ.P. 41(b) for Plaintiff's failure to prosecute. As an alternative sanction to dismissal, however, the Court ordered Plaintiff to pay $5,701.43 upon consideration of the evidence before it and arguments of counsel. The suit was dismissed only after Plaintiff did not pay the assessed amount or otherwise respond to the Court's Order within the time period specified.

33. At the time of the Court's May 19, 1983 Order, Plaintiff had the ability to pay the sanction assessed against her.

34. A sanction was also assessed against Plaintiff's counnsel. *See* Order dated April 29, 1983. The fines levied against Mr. Hernandez were reduced, however, and later withdrawn. Based upon the Court's familiarity with the pretrial proceedings and observation of Mr. Hernandez and his client when the matter came on for trial, the Court concluded that Plaintiff's sanction appropriately placed responsibility and remedied, at least in part, the injury caused to Defendant by the conduct of Plaintiff and her counsel.

35. Plaintiff specifically ratified and endorsed the actions of her lawyer (D. Hornbuckle Affidavit of Fact at 4, 5 filed May 27, 1983).

36. Plaintiff has made no offer of payment of the Court's sanction prior to dismissal.

Conclusion of Law

Based on the foregoing findings of Fact, the Court concludes that the sanction previously imposed on Plaintiff was and is appropriate, and this action is **DISMISSED** with prejudice.

SO ORDERED.

DATED: November 13, 1984.

/s/ Barefoot Sanders
Barefoot Sanders
United States District Judge

ORDER

Reference is made to the Court's Findings of Fact and Conclusions of Law, filed November 13, 1984. The list of documents ending at the top of Page 3 is hereby supplemented to incorporate the following Items 10-12 which are cited throughout the Court's Findings, but were inadvertently omitted from the list:

10. Affidavit of Eleanor Blaylock, dated September 19, 1984;

11. Affidavit of Cynthia Bengston, dated September 20, 1984;

12. Affidavit of Neal D. Bondy, dated October 8, 1984.

SO ORDERED.

DATED: November 15, 1984.

/s/ Barefoot Sanders
Barefoot Sanders
United States District Judge

APPENDIX C

VII. TRIAL PROCEDURE

Rule 8.1: Exhibits; Depositions; Exhibit and Witness Lists

(a) *Designating and Exchanging Exhibits and Depositions Prior to Trial.* All exhibits except impeachment documents are to be marked with tags obtained from the Clerk or Court Reporter and exchanged with opposing counsel at least three (3) days before the scheduled date for trial. When practicable, a copy of marked exhibits shall be furnished to the Court. All portions of depositions to be offered at trial shall be designated at least two (2) days before their use at trial.

(b) *Preparation and Submission of Exhibit and Witness Lists.* Before trial, counsel shall furnish to opposing counsel, the Court, and the Court Reporter a list of all exhibits and Witnesses except those offered solely for impeachment.

APPENDIX D

February 9, 1983

The Hon. Barefoot Sanders
United States District Judge
1100 Commerce Street
Dallas, Texas 75202

Re: Civil Action No. CA 3-81-1663-H;
Dorethea N. Hornbuckle v.
ARCO Oil and Gas Company

Dear Judge Sanders:

In accordance with the Order of the Court limiting my access to the items that the plaintiff had provided to the defendant, I did, during the time period allowed go to the office of counsel for the defendant and review the voluminous material in his conference room. Although most of the material seems to have no relevance to the issue at hand, I did determine that certain documents and papers did have such relevance that I would like to have them in order to be able to prepare for trial.

I am attaching hereto a list of the pages and a short synopsis of the explanation as to what further discovery I will be allowed.

I should like to suggest to the Court that I be allowed to make copies of this material and whatever protective order is deemed necessary by the defendent, I will agree to such a protective order, and that no one in my office except my secretary, my client, my paralegal, and I will be allowed to see this material, and it will not be made public in any fashion prior to submission of the proposed document. By this, I mean, that I will not file any brief or comparative data using this information without first alerting the Court.

If the Court deems a prehearing conference necessary, most certainly I will comply.

Sincerely yours,

Frank P. Hernandez

/s
Enclosure

cc: Mr. Bennett W. Cervin

DORETHEA HORNBUCKLE MATERIAL

Pages	
1-65	Comparison of minority and female employee's. by EEO-1 Job Categories.
66-230	Workforce analysis.
231-235	Listing of Black Employees — 4400's.
236-269	Listing of Minorities by Department.
273-286	Female 4400's.
461-633	Monthly Report, Alpha Listing, 11-15-80.
634-809	Monthly Report, Alpha Listing, 10-6-80.
810-873	Dallas Area Employees by Grade, 10-6-80.
874-936	Dallas Area Employees by Grade, 11-15-80.
937-1001	Dallas Area Employees by Grade, 12-23-80.
1050-51	Statistics of Labor Area — Dallas/Plano.
1055-56	Dallas-Fort Worth Statistics.
1057-66	Minority and Female Quarterly Report.
1075-78	Workforce Composition by Establishment-Job., 10-6-80, Dallas/Plano.
1087-91	Workforce Analysis, 6-20-80
1186-87	1980 Dallas/Plano Affirmative Action Plan.
1199	Sex Composition of Job Categories.
1722-25	Sex and Race Comparison, 1978-1979.
1777-80	G. T. Davis Memo, 2-1-80.
1798-1802	No material.

1914-38	G. T. Davis memo dated 9-15-80 covering Charge Report of 1-1-80 to 6-20-80.
2294-2350	Dallas Job Group, Workforce Utilization Analysis Affirmative Action Goals.
3055-3179	January, 1980 Statistics.
2892-2901	Plaintiff's EEO Charge information.
2935-62	Paul Grossman 1-24-80 letter.
2902-13	Plaintiff's Resume.

APPENDIX E

U.S. Constitution, Amend, V, Due Process Clause:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MERLIN E. WELLS

vs

PIZZA HUT OF AMERICA, INC.

Civil Action No.
CA 4-82-248-K

Fort Worth, Texas
April 26,1983
Commencing at 9:00 a.m.

EXCERPT FROM PROCEEDINGS
BEFORE THE HON. DAVID O. BELEW, JR.

TRANSCRIPT ORDERED BY: Mr. Frank P. Hernandez
DATE OF TRANSCRIPT ORDER: June 15, 1983

APPEARANCES:

For the Plaintiff:
Hernandez, Inc.
BY: MR. FRANK P. HERNANDEZ
2025 Cedar Springs
Dallas, Texas 75201

For the Defendant:
Simon, Peebles, Haskell
Gardner & Betty
BY: MR. RICHARD SIMON, JR.
200 Baker Building
Fort Worth, Texas 76102

Court Reporter:
Joseph D. Hendrick
301 U.S. Courthouse
Fort Worth, Texas 76102
(817) 332-4692

April 26, 1982. Commencing at 9:00 a.m.

THE COURT: Call the cases, Jeane, please.

COURT CLERK: Yes, Judge. CA 4-82-107-K. Gearhart Industries versus United States of America. Attorneys Dan Penner for plaintiff and Michael Greene for defendant.

MR. PENNER: Plaintiff is ready, Your Honor.

MR. Greene: Defendant is ready, Your Honor.

THE COURT: How is Mr. Greene?

MR. GREENE: Very good, Your Honor.

THE COURT: I read the little white slip thing and don't understand it. Penner says that ain't the law. Jeane's gone deaf and I'm deaf, so it's going to be tough, but we'll make it. All right. You both are ready? How long is this going to take?

MR. PENNER: I hope we get through in two days, Your Honor.

THE COURT: Two days?

MR. PENNER: But it may take a third day. We have got a jury view scheduled, if the Court will permit us, for right out here on the parking lot by the church.

THE COURT: Well, Mr. Simon is anxious to go to trial, and he'd like for you to expedite your case. Call the next one.

COURT CLERK: CA 4-82-243-K. Merlin E. Wells versus Pizza Hut of America, Incorporated. Attorneys Frank Hernandez for plaintiff, and Richard Simon, Jr., for defendant.

MR. HERNANDEZ: Plaintiff is ready.

MR. SIMON: We are ready, Your Honor.

THE COURT: How long is yours going to take?

MR. HERNANDEZ: Two days.

THE COURT: Well, why don't we do this? We are so bogged down with criminal that I feel bad about people such as you all, and Greene and Penner, that can't carry on their business for all the criminal activity and bankrupt activity. Somebody trying to stay in business doesn't stand a chance. But anyway, we will pick two juries, and if it doesn't look like we can get to you all, we may have to go — where would you be Monday or Tuesday? I know Colonial is coming up, Mr. Simon, and I hope to go myself.

MR. SIMON: Judge, I am going on vacation.

THE COURT: "I'm first up in Aspermont." Now, where are you?

MR. SIMON: I am going on vacation next Thursday, Judge.

THE COURT: Oh, we'd be through — Thursday? You mean local vacation?

MR. SIMON: No, sir.

THE COURT: You mean you are not going to watch Colonial.

MR. SIMON: A legitimate vacation, Judge.

THE COURT: We'd be through before then.

MR. SIMON: All right.

THE COURT: But if it looks like we could get you all and try it in a day or two and get through by Monday or Tuesday, would that keep you from going?

MR. SIMON: No.

THE COURT: Okay. I hate to keep you on the hook, but we will let you know something Thursday at the latest, one way or the other. But I think we ought to go ahead and pick these juries. What's you situation?

MR. HERNANDEZ: Well, Judge, that will be fine with me. My only problem, of course, is the medical testimony with the doctor. I had him scheduled for in the morning. He will be pleased if it's next week. But you know how hard it is to get a doctor.

THE COURT: Who is it?

MR. HERNANDEZ: Dr. Jewel Daughety.

THE COURT: Who?

MR. HERNANDEZ: Jewel Daughety from Dallas.

THE COURT: Well, we'll put him —

MR. HERNANDEZ: But if it's going to go Monday —

THE COURT: We will accommodate him.

MR. HERNANDEZ: I can get him, I think.

THE COURT: We will work it out with him. Okay. All right. We will pick two juries, then I will excuse you all and let you know something by Thursday.

MR. SIMON: All right, sir.

♦ ♦ ♦ ♦ ♦

THE COURT: All right. We will just stand at ease here until we get the jury up here, and I will let you all pick first so you can go about your business, and we will get rid of them and then — now don't talk to them too long. I will let you all question them. What's the nature of your case?

MR. HERNANDEZ: It's a negligence action involving a railroad cross tie at a Pizza Hut parking lot.

THE COURT: Where was the cross tie?

MR. HERNANDEZ: The cross tie was in the number one parking space. And the plaintiff —

THE COURT: Somebody left it there?

MR. HERNANDEZ: They put it there by design.

THE COURT: You mean to put your car wheels up against or some thing?

MR. HERNANDEZ: It's a parking lot, Your Honor, and she backed into it, and you can't see it over the hood, it's only about 18 inches tall, and when she went to drive off, the wheel gets stuck in the well, broke her arm and messed up her shoulder. It's not a complicated case.

THE COURT: Well, the trouble with your case is Mr. Simon was raised under one Hendrix Brown. His motto was "Don't pay." Even when the jury says so. Isn't that right?

MR. SIMON: That's right, Judge. We still take our oath every day.

♦ ♦ ♦ ♦ ♦

THE COURT: All right. We will just stand at ease for a few minutes, and we will get the jury up here.

(Break from 9:05 a.m. until 9:20 a.m.)

THE COURT: All right, ladies and gentlemen, we are going to try a civil case, a couple of them here. The first one, we are going to pick and — a jury, and then we are going to excuse you and — till probably Thursday. And then we are going to start the trial in the second case. And we will have to have you call in to see whether or not to come Thursday or Friday. Is there anyone that — in the case you are going to be in is a personal injury case where someone got hurt driving his or her car on a pizza parking lot. And the lawyers think it will take about two days. You might have to come back, say, Monday, May the 2nd.

♦ ♦ ♦ ♦ ♦

All right, Mr. Hernandez, you go ahead and tell them briefly about this matter.

(Whereupon, both sides conducted jury voir dire.)

♦ ♦ ♦ ♦ ♦

THE COURT: As Mrs. Alexander calls your name, would you take a seat in the jury box here, please?

(12 Jurors were empanelled.)

THE COURT: All right. Now, will you hold up your hand? We are going to call your names again and make sure we have got the right 12. Will you call them again, Jeane?

(Jurors' names called.)

♦ ♦ ♦ ♦ ♦

THE COURT: Mrs. Alexander is going to give you a number to call Wednesday after 5 o'clock, and we will tell you then when we need you. Now, please — we are not going to swear you in at this time as jurors. But for all purposes, you are officially a juror in this case. Please don't talk about the case. Don't go out to the scene of the accident. Don't try to find out anything about it. If somebody asks you what the situation is, just say it's an automobile accident and let it go. And we will excuse you, now, until you call in, and we will tell you then when to come back. All right. Everyone rise, please. Mrs. Alexander is going to give you this number to call, if you will just kind of come by — where are you going to get Jeane, to give it to them?

COURT CLERK: Right here as they come by.

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATE OF AMERICA	)	DOCKET NO. CR-3-83-120-R
	)	
VS.	)	Dallas, Texas
	)	April 28, 1983
JULIAN JUAREZ-RODRIQUEZ	)	9:30 a.m.
and JAVIER NAVA-GOMEZ	)	

EXERPT FROM SENTENCING

BEFORE THE HONORABLE JERRY BUCHMEYER

APPEARENCES:

For the Government:	MR. JAMES A. ROLFE By Mr. Jack Williamson
For the Defendant Nava-Gomez:	MR. FRANK P. HERNANDEZ
For the Defendant Juarez-Rodriquez:	MR. BENNIE J. JUAREZ

THE COURT: Mr. Hernandez, how many attorneys are on the list for special appointment cases, for cases requiring an interpreter?

MR. HERNANDEZ: I don't know, Judge. I'm --

THE COURT: I'm concerned that you and Mr. Juarez have both been up so frequently.

MR. HERNANDEZ: Yes, I --

THE COURT: I know there are -- should be more attorneys practicing law in Dallas.

MR. WILLIAMSON: Your Honor, may I be heard? As I

understand it, when we do cases of this nature, the Spanish speaking attorneys gets appointed by viture of the fact of communication difficulty. I don't know if there is any procedure to -- whereby the courts and the bar association can get together and retain the services of an interpreter to be used by english speaking attorneys when we have these types of cases. But I do want to compliment Mr. Juarez and Mr. Hernandez in this case particularly, because at the time that we arrested these Defendants we had 24 material witnesses in our custody and they both cooperated with us a great deal and very quickly in seeking the release of all but 8 of those material witnesses. So I just wanted to say on the record that I on behalf of the Government I appreciate the fine service and commend their cooperation, particularly with respect to this case.

THE COURT: I want to find out how many attorneys are actually on the list because I'm concerned with the burden that's being put on what I perceive to be a very small number of attorneys and I'll try to present that at the next Judges' meeting. I think I can get some additional attorneys added to the list without going through that but I'll take which --

MR. HERNANDEZ: The Mexican-American --

THE COURT: I may ask for some names from Mr. Hernandez.

MR. HERNANDEZ: The Mexican-American Bar Association, about 4 years ago we had some discussions with Judge Higginbotham about the fact that the appointments, and the burden, which it's a catch-22, when there is to be an appointment for a receivership or substantial ad litem or something, then the -- the Mexican-American community attorneys don't seem to be considered because we're too small, you can't take on the receivership, and we seem to be picking up this part of it. And I don't know how you -- you do the distribution of that but it's not been done, at least in my opinion, on a random

or any other basis. I don't know. It is a concern.

THE COURT: I've been thinking about the same thing on the more general ways of Court appointed attorneys and I think -- I don't have that many guardian ad litems but I think we need to try a system of calling Court appointed attorneys so they would get some additional compensation out of another lawsuit for what they have done here.

And I may bring that up at the Judges' meeting also because I think we would need that list. Keep both and you Mr. Juarez in mind the next time I have a flush appointment.